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PROMOTING THE EFFECTIVENESS OF DEMOCRACY PROTECTION INSTITUTIONS IN SOUTHERN AFRICA THE COMMISSION FOR INVESTIGATIONS AND THE PERMANENT HUMAN RIGHTS COMMISSION IN ZAMBIA



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DEMOCRACY PROTECTION INSTITUTIONS
IN SOUTHERN AFRICA

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EISA is a non-partisan organisation which seeks to promote democratic principles, free and fair elections, a strong civil society and good governance at all levels of Southern African society.



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PREFACE

This research report is the culmination of a project that EISA embarked on over three years, from 2007 to 2009, focusing on 'Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa'. The project, one of the components of a regional programme guided by the theme 'Consolidating Democratic Governance in the SADC Region: Phase II', has received financial support from the Swedish International Development Cooperation Agency (Sida) regional office in Harare, Zimbabwe, and the Royal Danish Embassy in Pretoria, South Africa. The seven elements of this regional programme are:

- Election quality
- Institutions of governance
- Gender equality and electoral processes
- SADC regional governance architecture
- The EISA annual symposium
- Regional resource centres
- The EISA democracy encyclopaedia

The overarching thrust of the programme is to improve governance architecture in Southern Africa, with a view to nurturing and consolidating democracy and sustaining peace and political stability, which are the key prerequisites for sustainable development and the eradication of poverty. The focus of this regional programme is consistent with EISA's vision of 'an African continent where democratic governance, human rights and citizen participation are upheld in a peaceful environment'. The primary goal is to enhance the quality of electoral processes, improve the capacity of key national and regional institutions that are central to the achievement of democratic governance in the SADC region, and help to reverse gender imbalances in political participation and representation. The specific objectives of the programme are to:

- improve the quality of elections, with a view to advancing democratic governance;
- enhance the effectiveness of selected governance institutions;

- improve gender equality in the realm of governance;
- promote democratic governance and political integration through the SADC Organ on Politics, Defence and Security and its strategic plan, SIPO;
- expand and deepen the knowledge base in relation to democratic governance in the SADC region.

The aim of this particular project is to contribute to enhancing the institutional effectiveness of governance institutions.

Conventionally, studies of and research relating to the state and governance have tended to focus on the traditional arms of government – the executive, the legislature and the judiciary – and the separation of powers among them, with some attention paid to the bureaucracy or civil service. This focus has reduced the role of the state in governance to these organs of government, to the exclusion of other equally important statutory bodies established by the government itself, namely the democracy protection institutions (DPIs).

Although the establishment of DPIs is one of the more effective methods of promoting democratic governance in the SADC region, these institutions have received little attention in the existing policy and academic discourse on democracy and governance. With this research project EISA aims to fill this lacuna in the democracy and governance debate in Southern Africa by restoring these institutions to their rightful place.

DPIs are those statutory institutions established by governments specifically to protect democratic governance. They may be enshrined in the country's constitution, supported by legislation, or created by legislation. The constitutional provisions and enabling legislation reinforce their significance in governance architecture at the national level.

At the continental level, the African Union (AU) has also come to realise and recognise the importance of DPIs to the promotion of democratic governance. Article 15 of the African Charter on Democracy, Elections and Governance, which was developed with technical assistance from EISA and was ultimately adopted by the AU Heads of State Assembly in Addis

Ababa, Ethiopia, in January 2007, specifically elaborates principles and best practice relating to DPIs.

This article commits AU member states to:

- establish public institutions that promote and support democracy and constitutional order;
- ensure that the independence or autonomy of the said institutions is guaranteed by the constitution;
- ensure that these institutions are accountable to competent national organs;
- provide the above-mentioned institutions with resources to perform their assigned missions efficiently and effectively.

The principles represent a clear commitment by African governments to strengthening the DPIs and promoting their institutional effectiveness. The aims are admirable, but, as the English aphorism goes, the proof of the pudding is in the eating. It is one thing for African governments to make such commitments, it is quite another to translate them into practice. In other words, as this report will illustrate, African governments do not always 'walk the talk'. Put somewhat differently, few African countries practise what the African Charter on Democracy, Elections and Governance preaches.

In 2008 EISA analysed three democracy protection institutions that are central to the achievement of democratic governance in the SADC region. These were: the Office of the Ombudsman, national human rights institutions (NHRIs), and electoral management bodies (EMBs) in 14 SADC member states. The analysis, which was guided by a list of questions, revealed different stages of institutional development in each country and established that the remit of the institutions differs from one country to another.

In 2009 the focus of the project shifted from the normative aspects addressed in the first stage to an assessment of the performance, effectiveness, independence and relationships of these institutions to other arms of government, other democracy protection institutions, and civil society,

within their operating environment. Empirical research was conducted by researchers in each country between March and July 2009 into two institutions – the Office of the Ombudsman and the national human rights commission – in the eight countries: Botswana, Lesotho, Malawi, Mauritius, Namibia, South Africa, Tanzania and Zambia.

Conventionally, the Office of the Ombudsman is established to protect the people against violations of human rights, the abuse of power by public institutions, error, negligence, unfair decisions and maladministration, in order to improve public administration with a view to making governments responsive to people's needs and public servants more accountable to members of the public. This office has emerged as an important avenue for individual complaints against the actions of public authorities.

Typically, national human rights institutions are mandated to protect and promote human rights. A number of countries have established NHRIs which use the Ombudsman concept. The genesis of NHRIs lies in a resolution passed in 1946 by the United Nations Economic and Social Council inviting member states to consider the desirability of establishing local information groups or human rights committees to serve as vehicles for collaboration with the United Nations.

In 1991 delegates to the first International Workshop on National Institutions for the Promotion and Protection of Human Rights agreed on the Paris Principles, which were adopted a year later. The Paris Principles are a set of broad general standards which apply to all NHRIs, regardless of their structure or type. They are adopted by NHRIs and endorsed by the UN Commission on Human Rights and the UN General Assembly. Among the main principles are that the NHRI must:

- be independent and be guaranteed by statute or the constitution;
- be autonomous from government;
- be plural and diverse in its membership;
- have a broad mandate based on universal human rights standards;
- have adequate powers of investigation;
- have sufficient resources to carry out its functions.

The mandates of these two DPIs to address administrative and executive impropriety and ensure the respect and promotion of human rights suggest that they play an important role in exercising oversight over the executive and in promoting democracy, human dignity, and the rule of law. The overall objective of this research project, therefore, was to investigate the extent to which they have translated their mandate into action, thereby advancing and protecting democracy. The research examined the performance of the two institutions with regard to the following: legal framework, the effectiveness of institutional governance, independence, resources, and interaction with the other arms of government, the public, and non-state actors.

In July 2009 EISA convened a one-day policy dialogue forum during which senior officials of the 12 DPIs covered in the research, as well as the researchers, came together to deliberate on the findings. Thereafter, the researchers refined their reports, taking into account the input of the DPI officials. The culmination of the research project is eight country reports, in which the political, operational and resource conditions and constraints under which these institutions function are analysed.

The mere presence of offices of the Ombudsman and NHRIs in the SADC region is, in itself, an encouraging step, although not all SADC countries have these institutions in place. Where they do exist they do so in a variety of forms, with different nomenclatures, and each has its own character.

I acknowledge with gratitude all those whose input resulted in the successful implementation of the project. First and foremost, EISA's Executive Director, Denis Kadima, who contributed immeasurably to the conceptualisation of the regional programme on consolidating democratic governance in the SADC region, of which the DPI project is a part. I am grateful too to Ebrahim Fakir, Manager of Governance Institutions and Processes at EISA, for guiding the research process and editing the reports, thereby ensuring their quality. Without the selfless commitment and dedication of the project coordinator, Catherine Musuva, this project would not have seen the light of day. I take my hat off to her for her hard work.

The project would not have succeeded without the dedication of our research associates, based in the eight countries, who conducted the fieldwork. I

am equally indebted to the officials and staff of the democracy protection institutions, who supported the project with information and participated in the policy dialogue, and to the various respondents who willingly supplied the researchers with additional insights.

It would be remiss of me not to extend a special word of thanks to Professor Kader Asmal, former member of the South African Parliament and former Cabinet minister, who is currently a professor of law at the University of the Western Cape and who, despite his busy schedule, graced our multi-stakeholder dialogue workshop with his presence giving a thought-provoking and insightful keynote address on DPIs and setting the scene for what proved to be a lively discussion among the participants. I am pleased to report that some of Professor Asmal's ideas and thoughts have found a place in the reports.

Various other colleagues at EISA played their own distinctive roles in supporting this project and their contributions deserve acknowledgement. They are Kedibone Tyeda, Nkgakong Mokonyane, Maureen Moloi, Jackie Kalley, Alka Larkan, Oliva Fumbuka, Edward Veremu, Dipti Bava, Wallen Chidawanyika and Usha Kala. Our editor, Pat Tucker, and typesetter, Sue Sandrock, have done a marvellous job controlling the quality of our publications, for which we are hugely thankful.

Finally, I am profoundly grateful to our partners, Sida Regional Office in Harare, Zimbabwe, and the Royal Danish Embassy in Pretoria, South Africa, for their generous financial support.

In conclusion, I hope and trust that this research report will assist policy-makers to identify areas of organisational and institutional reform in order to improve the effectiveness, efficiency and responsiveness of DPIs and, in the process, deepen and entrench democratic governance in the SADC region.

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September 2009*

ABOUT THE AUTHOR

Annie Chewe-Chanda, who has practised law since 1997, is a lawyer with the National Legal Aid Clinic for Women, a project of the Law Association of Zambia. She is actively involved in community service and public awareness programmes, including workshops and radio and television programmes on a variety of topics. She holds an LLB degree from the University of Zambia, a Master's degree in Intellectual Property and Human Rights from the Raoul Wallenberg Institute of the Lund University in Sweden and a post-graduate diploma in International Humanitarian Law from the University of Pretoria Centre for Human Rights. She has taught law and supervised student research projects at the School of Law at the University of Zambia since 2000 and has conducted and participated in research, including a project on tertiary education in Zambia, another on the rights of the child and one on prison conditions in Zambia.

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This report has been made possible by help from many people and institutions. The researcher pays tribute to EISA, which commissioned the work, and which, at great cost, has ensured that it has come to fruition.

I also thank most sincerely the respondents who helped by filling out questionnaires and who agreed to give interviews at short notice. I must specifically mention Mr Palan Mulonda, vice-chairperson of the Permanent Human Rights Commission and lecturer in Law at the University of Zambia, and Mr Boniface Mbuze, secretary of the Commission for Investigations. This work would not have been completed without their help on behalf of their institutions. Furthermore, I thank representatives of the non-governmental organisations visited during the process for sparing time to discuss the issues.

Finally I thank Dr Khabele Matlosa, Catherine Musuva and Nkgakong Mokonyane for all their efforts in organising the research and the logistics required for its completion.

ABBREVIATIONS

CI	Commission for Investigations
PHRC	Permanent Human Rights Commission
SACCORD	Southern African Centre for Constructive Dispute Resolution
TIZ	Transparency International Zambia
ZCEA	Zambia Civic Education Association
NGO	Non-governmental organisation
LRF	Legal Resources Foundation
FODEP	Foundation for Democratic Process

EXECUTIVE SUMMARY

This research was commissioned by EISA with the object of establishing how effectively the selected institutions are promoting and protecting democracy in Southern Africa. The institutions selected for investigation were the Ombudsman and/or the human rights commission in eight countries. The research commenced with a situational analysis of documentation relating to the existence of the institutions. This was followed by fieldwork on their operation.

It must be mentioned here that the two bodies do not exist in all the selected countries. In Zambia the institutions under investigation are the Permanent Human Rights Commission (PHRC) and the Commission for Investigations (CI), the latter known in other countries as the Ombudsman.

The research, which was conducted by means of a questionnaire detailing various aspects of the operation of the institutions, is a qualitative rather than a quantitative analysis of the operations of the two bodies, the idea being to establish the extent to which they protect and promote democracy through their work. The research was also supported by interviews conducted with various stakeholders.

In Zambia both the PHRC and the CI were created by the Constitution and each has an Act of Parliament detailing its day-to-day operations. The two bodies were created because of a felt need to protect the human rights of the country's citizens by checking the use by the authorities of discretionary and other powers. The CI has been in existence for 35 years, the PHRC for 12. The heads of both institutions, who must be qualified to be appointed puisne judges (judges of a superior court), are appointed to their positions by the president in consultation with the Judicial Service Commission. The reason for this is that the two bodies should command confidence from all sectors of society and only highly qualified lawyers are considered suitable to run their affairs.

The legal provisions that govern the organisations allow them sufficient space to operate and to ensure the growth of democracy and good governance.

The bodies are mandated to take the initiative in instituting investigations of human rights abuses and to deal with individuals who complain about government systems that do not promote their human rights.

The PHRC has five commissioners, including the chairperson and the vice-chairperson, and a secretariat that deals with cases on a daily basis, while the commissioners sit on a part-time basis. It has several committees, including the case review committee and the monitoring and evaluation committee. The CI, on the other hand, has three commissioners who hear cases. It is important to note that the sittings of the CI are held in camera, while those of the PHRC are public. Over the years, the two bodies have made pronouncements and recommendations about certain measures that should be implemented to bring an end to human rights abuses.

Despite the existence of legal provisions that fully support the operation of the two bodies it was found that their work is hampered by many factors, among them inadequate and irregular funding; understaffing, especially of professionals; lack of equipment and transport. Both bodies have similar problems and this has led to their failure to resolve successfully the total number of cases they receive each year, resulting in a backlog.

Another problem is the lack of appreciation by the general public of the mandates of the two organisations. This is blamed on the fact that the work of the two bodies has not been publicised, though recently efforts have been made to engage in sensitisation programmes by means of workshops and radio broadcasts. In relation to the CI one major hindrance is the centralisation of the office. The institution has only one office, in Lusaka, and there are no provincial or district centres, which makes it very difficult for people to reach it. Another problem is that the two bodies have no powers to prosecute and can only make recommendations to relevant authorities once they have heard the cases. There is, however, no guarantee that the recommendations will be implemented.

It is therefore recommended that if the two bodies are to implement their mandates effectively the government must urgently increase funding, which must be released on time and in full rather than, as at present, in the form of piecemeal grants.

There is also a need to strengthen the operations of the two bodies by acting quickly upon their recommendations. It is therefore felt that recommendations should be treated with the degree of seriousness accorded to High Court judgements. Another option would be for the two bodies to be given the power to prosecute all matters found by them to warrant such action so that the end result is a court order.

Further, an effort must be made to publicise the work of the two bodies through both the print and electronic media. The establishment of district and provincial offices, especially for the Commission for Investigations, should be treated as a matter of urgency and people should be employed to staff them. Since the work of the two bodies should be complemented by that of other institutions a deliberate effort should be made to ensure that there is no conflict of mandates and no unnecessary replication of roles.

When all these recommendations are implemented it will be possible to consider the two bodies as protectors of democracy and good governance.

INTRODUCTION

This research was commissioned by EISA, an institution committed to 'promoting credible elections and democratic governance in Africa', with one of its major objectives being to ensure that African governments embrace the ideals of democracy both in theory and in practice.

Democracy protection institutions are pillars of democracy in the sense that their mandate is to ensure the implementation of the ideals of democracy.

The research commenced with a situational analysis of selected democracy institutions – offices of the Ombudsman or the equivalent, and human rights commissions, where they exist – in eight countries in Southern Africa. The Ombudsman is known in Zambia as the Commission for Investigations (CI).

The study was undertaken with the aim of establishing through investigative field research the practical realities that pertain to the two institutions and to establish whether they are fulfilling their mandates. In Zambia, the research focused on the CI and the Permanent Human Rights Commission. These two institutions have existed in Zambia for more than 35 and 12 years respectively and were created in response to a need at the time. They remain quite relevant today.

The report sets out the background to the creation of the two institutions and the legal framework within which they were established. It then details the findings relating to their effectiveness and how they have interacted with other organs. The final sections highlight the main findings, leading to a conclusion and recommendations.

METHODOLOGY

The research was conducted by means of a questionnaire distributed to officials of the relevant institutions during the months of March and April 2009. The questionnaire focused on the institutional governance, effectiveness, and independence of the two bodies, assessed from the point of view of their relationships with government bodies and the public as well as with non-state actors. The intention was to establish whether they adhere to their stated mandate to promote and protect democracy.

The completion of the questionnaire was followed by verbal discussions, with the intention of gathering further information and clarifying certain aspects of the operations of the selected institutions. The discussions were also aimed at establishing whether the institutions do, in fact, function to promote and protect democracy in the country. The questionnaire and discussions were complemented by a review of literature relating to the two institutions. The researcher also made use of news items. As is the case with much research, it was not as easy as expected to source information.

CONTEXTUAL BACKGROUND

The implementation of the principle of legality in public administration depends upon a number of factors. Most important of these are a government which is more or less committed to upholding the principle, a citizenry which is both aware of its legal rights and prepared to resist attempts to infringe them, and institutions through which such challenges can be prosecuted (Robert 1977, p 239). Studies in many African countries have shown that this is not the case or that the principle of legality is stifled to such an extent as to nullify its existence (Nwabuezi 1973). It must be noted that the concept of limiting the amount of criticism a government will accept stems from the colonial period, when Africans were not allowed to criticise their colonial masters.¹

Political criticism has been frowned upon and economic concerns have been shelved under the pretext of a lack of resources. However, it is worth mentioning that legality is not directly related to development as the two can operate independently. In today's world the observance of human rights has been restricted in many respects by the derogations that have been allowed in constitutions² and also by economic considerations, with many African governments claiming that they do not have the resources to ensure that their citizens enjoy certain rights,³ instead they undertake to realise them progressively.

At independence Zambia inherited a legal system modelled on the colonial master's Westminster system. The courts were perceived as institutions of justice for all, which, because their decisions are based on law, would support the principle of legality. Like other African governments Zambia's was not ready to accept criticism and thus perceived judgements that touched on political issues as being those of deviant individuals.

Human rights and fundamental freedoms guaranteed by the Constitution were frequently ignored during the first and second republics and human rights abuses became the order of the day. There was obviously an urgent

need to have institutions in place with the mandate to enforce, or at least look into, the welfare of aggrieved individuals. The courts have generally lacked legitimacy in the eyes of both politicians and citizens as each group accuses them of favouring the other in their judgements. Unwarranted criticism of the bench made the judiciary not only timid but also highly unprofessional in the conduct of its duties, a situation that has changed little, even in recent years.⁴

Pressure mounted on the government as a result of the abuse of human rights led to the creation of the Permanent Human Rights Commission. Many people complained bitterly about the degree of abuse to which they were subjected while in detention. There were also complaints that the laws were not responding to the needs of the people they were meant to protect.

The establishment of the PHRC was recommended by the Bruce Munyama Human Rights Commission of Inquiry, which had been appointed to examine the human rights situation in the country prior to the re-introduction of multiparty politics. The commission was set up to investigate complaints about rampant human rights violations during the first and second republics, when many individual freedoms and liberties were curtailed, abuse was rampant and there was no freedom to exercise human rights.

The establishment of a permanent institution to look into abuses of human rights was also recommended by the Mwanakatwe Constitutional Review Commission, appointed to gather information about the revision of the Constitution, leading to its amendment in 1996 (Mwanakatwe 1995).

In terms of the composition of the institution both commissions proposed that it comprise a range of people with different specialities. However, what has been accepted is a hybrid system instituted by the government at the introduction of the amended Constitution of 1996.

The creation of the Commission for Investigations was proposed by the Chona Commission of Inquiry, which had been mandated to consider the form the one-party state was to take, not whether or not Zambia should

be transformed into a one-party participatory democracy, as it was called (Mwale 2006). The institution was to be impartial and independent and would deal with complaints on an informal basis, thus avoiding the cost and the complications of the court system. The CI would not only check the excessive use of power but would also protect the administration by rejecting unnecessary and frivolous complaints (The Chona Report 1972).

The CI was formed in 1974 (Hatchard 1992, p 46). Several other African states created similar institutions (Tanzania 1966, Mauritius 1968, Nigeria 1975 and Zimbabwe 1980). The institution is the equivalent of what, in many countries, is known as the Ombudsman. In Zambia the commission is headed by the investigator general, appointed by the president in consultation with the Judicial Service Commission (Article 90 Republican Constitution 1996).

CONSTITUTIONAL AND LEGAL FRAMEWORK

PERMANENT HUMAN RIGHTS COMMISSION

The Permanent Human Rights Commission was created in terms of Part XII of the amended 1996 Republican Constitution. It is specifically provided for in Article 125, which states that 'there is hereby established a Human Rights Commission. The Human Rights Commission shall be autonomous.'

The powers, functions, composition, funding and administrative procedures, including the employment of staff, it continues, is prescribed by or under an Act of Parliament (Article 126 Constitution 1996). The Human Rights Commission Act, Chapter 48 of the laws of Zambia, was enacted in 2002 by Statutory Instrument No 22 of that year. This Act provides for the autonomy, appointment and composition of the commission, its functions and powers, the tenure of the commissioners, complaints mechanism and meetings.

It further provides for the directorate of the commission (ss 3-20). The commission's daily work is undertaken by a full-time secretariat, headed by an executive director, whereas commissioners meet at scheduled sessions and serve on a part-time basis.

Autonomy

Section 3 of the Human Rights Act provides that the commission is an autonomous body, which, in the performance of its duties, is not subject to the direction or control of any person or authority. In this regard it does not serve under a government ministry, although, for administrative purposes, its links with the state are established through the office of the vice-president and the vice-president presents the commission's budget to Parliament. In terms of s 22 the funds of the commission 'shall consist of such monies as may be appropriated by Parliament; or paid to the Commission by way of grants or donations or those that vest or accrue to the Commission'.

Despite a direct grant from the government the commission does not have sufficient funds to meet its mandate. It does receive some funding from other institutions, but this is earmarked for specific events and cannot be used generally for its administrative operations.

Composition and removal from office

The commission consists of a chairperson and a vice-chairperson, both of whom must be qualified to be appointed High Court judges. In addition, there are not more than five commissioners, appointed by the president subject to ratification by the National Assembly (s 5 of the HRC Act, Ch 48 of the laws of Zambia). The commissioners hold office for three years, a period that is subject to renewal. A person may cease to hold office upon resignation (s 7(3)) or removal for inability to perform the functions of the office, whether arising from infirmity of body or mind, incompetence or misbehaviour (s 7(2)).

FUNCTIONS

These are set out in s 9 of the HRC Act. The commission is mandated to:

- a) investigate human rights violations;
- b) investigate any maladministration of justice;
- c) propose effective measures to prevent human rights abuses;
- d) visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the persons held therein and make recommendations to redress existing problems;⁵
- e) establish a continuing programme of research, education, information and rehabilitation of victims of human rights abuses to enhance the respect for and protection of human rights;⁶
- f) do all such things as are incidental or conducive to the attainment of the functions of the commission.

In a bid to fulfil its mandate the PHRC has often commented and made pronouncements on various issues. Such statements are made either by the chairperson, the vice-chairperson or the executive director.⁷ As a body

mandated to look into human rights abuses and with a responsibility to inform the public about the human rights situation in the country, the commission's pronouncements have found favour with many people.

Powers

In terms of s 10(1) of the HRC Act the commission has the power to investigate any human rights abuses on its own initiative or on receipt of a complaint or allegation from an aggrieved person or a person acting on behalf of others. After receiving a complaint the commission may summon the person against whom the allegation is levelled and question that person in relation to the allegation.

The commission has the power to recommend the punishment of any officer it finds to have perpetrated an abuse of human rights (s 10(2)). It may also, where it considers it necessary, recommend (a) the release of a person from detention,⁸ (b) the payment of compensation to a victim of human rights abuses or to the victim's family, (c) that an aggrieved person seek redress in a court of law, or (d) such other action as it considers necessary to remedy the infringement of a right (s 10(4)). It may not, however, interfere in a matter that is already before a court of law (s 10(5)).

Complaints may be made verbally or in writing and are directed to the secretary. The commission will only entertain complaints that are made within two years of the date on which the facts giving rise to the complaint or the allegation became known to the complainant (s 11(3)). Where the commission considers that the complaint is malicious, frivolous, vexatious, or does not disclose sufficient information to warrant an investigation it may refuse to hear it and must give the complainant the reasons for its decision (11(4&5)).

The commission's sittings are held in public unless it decides otherwise, and the reports of its deliberations are provided to the parties involved (s 12). The reports contain the commission's recommendations to the appropriate authority and the authority must act within 30 days of receiving such recommendations (s 13). By the time this research ended, in July 2009, there was no information available about how long the authorities take to respond and act upon reports from the PHRC.

Immunity

The staff of the commission are immune from both civil and criminal prosecution for any actions during the course of their official duties and may not be called upon to testify before any court or tribunal to give evidence about information they have received in the exercise of the functions of the commission.

However, this immunity does not extend to actions of any commissioner or member of staff outside the functions of such person's office (s 20). This, to a large extent, enables the staff to conduct in-depth investigations into alleged abuses of human rights.

Furthermore, the commissioners have access to information and institutions without unnecessary bureaucracy to impede them from carrying out investigations. Such provisions are commendable in an environment that seeks to deal with human rights abuses in the hope of ending the scourge. However, the work of the commission is hampered in many ways by factors such as shortage of staff, transport and funding.

THE COMMISSION FOR INVESTIGATIONS

The Commission for Investigations was created in 1974 in response to a recommendation by the Chona Commission of Inquiry. It was provided for under Article 117 of the 1973 Republican Constitution, which spelt out its powers and jurisdiction. The Commission for Investigations Act 1974, Chapter 183 of the laws of Zambia, dealt with the operations of the CI. The two instruments were amended in 1991 and 1996 and the CI is now provided for in s 4 of the Commission for Investigations Act, Ch 39 of the laws of Zambia.

In terms of Article 125 of the Constitution the president has the power to appoint the investigator-general in consultation with the Judicial Service Commission. To be appointed investigator-general a person must be qualified to hold high judicial office, that is, to be appointed a judge of the High Court. The investigator-general must leave office at the age of 65 (cl 3) or may be removed for incompetence or the inability to perform the functions of his/her office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour (Constitution, cl 5).

Such removal can only take place after publication of the findings of a tribunal duly constituted to carry out an investigation into the alleged misconduct (cls 6-10). The person may also resign from office after giving three months' notice to the president (cl 12). In terms of cl 13 of Article 90 of the Constitution the functions, powers and procedures of the investigator-general are as set out in an Act of Parliament.

The Commission consists of the investigator-general and three commissioners appointed by the president (s 4).

A person may not be qualified for appointment as a commissioner if he or she holds the office of president, vice-president, minister or deputy minister, or if he or she is a member of the National Assembly (s 5). In terms of s 6 the commission must employ a secretary and such other members of staff as may be required, and these shall be public officers.

Application

In terms of s 3 the Act applies to:

- (a) any person in the service of the Republic;
- (b) the members and persons in the service of local authorities;
- (c) the members and persons in the service of any institution or organisation, whether established by or under an Act of Parliament or otherwise, in which the Government holds a majority of shares or exercises financial or administrative control;
- (d) the members and persons in the service of any Commission established by or under the Constitution or any Act of Parliament BUT not the president.

This significance of this section is that the president is immune from prosecution and investigation, as set out in Article 43 of the Constitution.

Although many people believe the commission's mandate allows it to deal with any issue, it is, in fact, only empowered to deal with civil servants; it

does not investigate complaints against officials or employees of private institutions. This misapprehension suggests a failure by the commission to publicise its services and mandate.

Jurisdiction

In terms of s 8 of the Act, the commission may investigate, at the behest of the president or of its own volition, any case relating to allegations of maladministration or abuse of office or authority. It is commendable that the Act provides for the commission to exercise some initiative, although, when assessed holistically, as will be seen below, the initiative is restricted in many ways. In fact, it is difficult to establish any occasion on which the commission has exercised its own initiative, although this may be because of the secret nature of its operations.

The commission receives complaints from members of the public, which must be made within two years of the date on which the complainant became aware of the facts surrounding the allegation (s 9 of the CI Act). The object of this provision is to discourage unnecessary and trumped up allegations and to assist the commission in the execution of its duties by providing information timeously. Another reason is that if there is a long delay in reporting the actions of an official the person concerned may be transferred or may resign.

Section 10 of the Act states that

no investigations under this Act shall be conducted concerning any allegation or grievance where the complainant or the person aggrieved has or has had at any material time, the right or opportunity of obtaining relief or seeking redress by means of: (a) an application or representation to any executive authority; or (b) an application, appeal, reference or review to or before a tribunal established by or under any law; or (c) proceedings in a court of law.

This suggests that a complaint to the commission should be the last resort after the complainant has exhausted not only administrative avenues but also legal avenues through the courts of law, unless there are compelling

reasons to believe that the means of relief set out above would be detrimental to the individual concerned.

The reason for this requirement is that the Commission may only make a recommendation. The recommendation may or may not be implemented, therefore, if a person is able to get more justice elsewhere he or she should seek to do so. This might be perceived as being retrogressive in the sense that proceedings under administrative bodies like the CI are considered to be cheap and more user friendly than the courts. One would imagine that the reason for this is to avert a situation where a person may be disadvantaged by lengthy and/or fruitless investigations. Therefore, if it is possible for people to achieve justice by other means they may well pursue those.

The provisions of the Act give the commission wide-ranging powers. In terms of s 11 'the Jurisdiction and powers conferred on the Commission may be exercised notwithstanding any provision in any written law to the effect that an act or omission shall be final, or that no appeal shall lie in respect thereof, or that no proceeding or decision shall be challenged, reviewed, quashed or called into question.' This section gives the commission unrestricted powers to act, even where other bodies or institutions have been restricted from doing so, its intention being to allow the commission to investigate abuses of authority by public officials.

The power the Act confers on the commission to carry out investigations on its own initiative essentially means that it can investigate any question of maladministration. However, even when the media have reported incidents of maladministration the commission has taken no action – it acts only when there is a complainant. It is therefore doubtful whether the spirit of s 11 has been followed.

In carrying out its investigations the commission has the power to issue such orders or writs as it considers appropriate, thus ensuring that its work is not unduly hampered or frustrated by those involved or cited in the complaints. These orders or writs have the same force as court orders (s 12) and must be obeyed by those involved. Should they refuse to obey, punitive action may be taken against them to ensure that they comply.

However, once the commission has completed its investigation it does not hand down judgements or orders but instead makes recommendations to the president detailing any measures it perceives will atone for the wrong done.

The fact that there is no guarantee that the recommendations will be acted upon results in a contradiction between provisions giving the commission wide powers and the fact that the end result of any investigation it conducts is a mere recommendation, with no indication of how the relevant authorities will act on it.

Part III of the Act gives the commission wide-ranging powers. In terms of s 14 it may validly bypass any rules relating to secrecy or other restrictions on the disclosure of information, whether imposed by law or otherwise. This means that nobody who appears before the commission, or who is summoned to produce information relating to any investigation, may validly claim that information he or she possesses or has in his/her custody is privileged.

The rules of court applicable to the production of information do not apply to the commission. The reason for this is to enable the commission carry out its investigations freely and to have access to necessary information. There is no excuse, therefore, for it to fail in its work. However, the same section contains a proviso that, in matters relating to issues of security, defence or international relations or if the investigation might disclose the deliberations of the Cabinet or its sub-committees on matters of a secret or confidential nature that would be injurious to the public, the commission may not act unless it is specifically permitted by the president to do so.

This proviso has the effect of halting investigations and, like all claw-back provisions, it gives wide-ranging powers on the one hand and takes them away on the other. It is matters like this that, in practice, affect its operations. Many other sections contain the same derogations.

The commission holds its sessions in camera and no members of the public who are not complainants are allowed to be present. Section 17(2) precludes the right to legal representation or for persons appearing

before the commission to be heard. The only exception is that when the commission proposes to conduct an investigation under the Act pursuant to a complaint or allegation it must give the principal officer of the department or authority concerned, or the accused, an opportunity to comment on the allegations and no comment that is adverse to the person may be published in the report.

The commission has the power to order the arrest of any witness who refuses to be sworn in or who gives false information or wilfully insults, obstructs or interrupts any members of staff of the commission in the performance of their functions in terms of the Act.

After the deliberations the commission prepares a report, which is submitted to the president for consideration and action. The commission has the power to recommend what action should be taken. Where the complainant has suffered loss or injury as a result of alleged misconduct or maladministration or abuse of authority, the commission may, in its recommendations, state that compensation should be paid to the person and determine the sum of that compensation (s 20). In terms of s 21 the president has the power to make any decision he or she deems fit about the report submitted by the commission. The complainant and the person against whom the allegation was made are notified of the decision.

The commission may recommend that compensation be paid to a person found to have suffered as a result of maladministration, the amount to be paid from the general revenue of the Republic. The reason for this is that all allegations dealt with by the commission are against individuals in their capacity as public officials. It is, however, felt that paying compensation out of the general revenue may encourage wrongdoing, because the offender suffers no pain. It might be prudent to deduct the compensation from the offender's income, at least where malice has been proved.

Mandate

In terms of its mandate the commission deals with complaints relating to the arbitrary use of authority, omissions, improper use of discretionary powers, decisions made with bad or malicious motives or influenced by irrelevant considerations, unexplained or unnecessary delays, bad

decisions, misapplication and misinterpretation of the law (Phiri 1986, p 236; Part III of chapter 39 of the laws of Zambia). However, the commission should take action where a person has laid a complaint within the two-year period and has exhausted all administrative and legal procedures.

In terms of s 10(2) the commission may refuse to conduct or may discontinue an investigation if it is satisfied that the complaint is trivial, frivolous or vexatious or that it has not been made in good faith. Further, the commission may refuse to hear a complaint if the inquiry would be unnecessary, improper or fruitless. While the commission must notify the affected individual in writing about such a decision, it is not obliged to give reasons for it.

This provision makes the whole process suspicious in the sense that an individual who believes his/her case is just may find the complaint thrown out for no apparent, or for a hidden, reason. It has been argued that this provision has the effect of turning the commission into a political institution which can be controlled by those in power should they be up for investigation. This argument is compounded by the fact that the investigator-general is appointed by the president and therefore owes his/her allegiance to the same person or body of persons.

Immunity

Once the commission has concluded its processes and has submitted a report to the president its decision or conclusion may not be challenged for any reason except the absence of jurisdiction to inquire into the particular allegation (s 23). Similarly, no proceedings, whether civil or criminal, may be brought against any member of the commission or member of staff of the commission for anything done in good faith in the course of the exercise of his/her functions under the Act.

Further, no member of staff or member of the commission may be called to give evidence before any court or tribunal in respect of any information acquired in the exercise of his/her functions under the Act (s 24). This provision gives the commission's members and its staff sufficient room to carry out their duties without fear of intimidation.

INSTITUTIONAL GOVERNANCE AND EFFECTIVENESS

The existence of the two institutions is, in large measure, assisted by the judicially enforceable Bill of Rights entrenched in Part III, Articles 11-26 of the Constitution. Since both institutions are concerned with human rights their work would be impossible if human rights were not legally recognised and justiciable. Since economic, social and cultural rights in Zambia are not justiciable, the Bill of Rights contains only civil and political rights. Although it might appear that the two institutions are doing the same thing, dealing as they do with human rights issues with the aim of helping the country attain good governance both at individual citizen level and at institutional level, there are some differences in their mode of operation (Burdekin 1992).

- The role of the Ombudsman (Commission for Investigations) is to ensure general fairness and legality in public administration, while the human rights commission focuses on human rights and non-discrimination and its work, therefore, extends beyond the actions of government to include other areas of public life.
- The Ombudsman deals with individual complaints against public officials; the human rights commission deals with individual complaints against government systems and also focuses on the way individuals are treated by the authorities.
- The Office of the Ombudsman focuses on national legislation, while the human rights commission is also involved on the international scene, judging how the nation is benefiting from accepted international standards.
- The Commission for Investigations focuses on redress for individuals while the PHRC, in addition to aiming to attain human rights for individuals, extends to the citizenry as a whole.

Although the law provides a legal framework for the operation of the two institutions there may be disparities between what is provided for and what is actually happening. The next sections will therefore be dedicated to analysing the operations of the institutions, balancing these against the legal framework and mandates discussed above.

THE PERMANENT HUMAN RIGHTS COMMISSION

The PHRC was created in 1997 by an amendment to the Republican Constitution in response to the findings of the Munyama Human Rights Commission of 1992. The main reason for its creation was to promote and protect the human rights of individuals. The PHRC has a very broad mandate to deal with human rights abuses, with the power to act on reports as well as to initiate investigations. Its work is complemented in various ways by other institutions, both governmental and civil society. However, the enabling legislation gives the PHRC the power to visit any detention facility without restriction. Other institutions require permission before they may enter such facilities, let alone conduct research there.⁹

The commission has a complaints mechanism and an investigation wing which carries out fieldwork. It also has a case review committee. As it aims for 100 per cent case resolution and receives more than 1000 cases a year, the commission operates through several committees, to ensure that its work is coordinated and moves quickly.

In order to assess the effectiveness of the measures implemented, the commission periodically monitors and evaluates its activities, producing annual reports detailing its activities during the year, its achievements and challenges. These reports are directed to the president and are posted on the commission's website, where members of the public can access them.

In order to reach out to as many people as possible the commission carries out sensitisation programmes using radio and television, theatre and drama performances. The commission, and, in particular, the chairperson, vice-chairperson and executive director on its behalf, hold media briefings at which they make pronouncements on certain issues. It also produces and distributes information, educational and communication materials

and engages in strategic planning every three years to ensure a consistent focus in its work. On the whole, the PHRC strives for the incorporation into national legislation of the international and regional human rights instruments to which Zambia is a party.

The commission makes recommendations to the president at the end of investigations or visits to places of detention. There is no guarantee that such recommendations will be implemented, a factor that may be regarded as a hindrance to the work of the PHRC as it cannot be sure what action will be taken by those in authority to put an end to the problems the commission has unearthed.

Since human rights issues are generally urgent, greater assurance of the time it will take to effect the recommendations would help the work of the commission and ensure confidence and certainty and therefore the promotion of the rule of law and democracy. Although it is not a court of law, it is felt that the law should have provided that the commission's recommendations are binding on those to whom they are addressed. Failure to implement the recommendations has the effect of turning the commission into a toothless body and, therefore, a circus.

One example is the commission's call for the removal of the death penalty from the statute book, a move which has resulted in nothing more than an unofficial moratorium, suspending the execution of those on death row. On 22 January 2009 the chairperson of the PHRC commended the president for commuting the sentences of 53 inmates on death row, saying the right to life must be upheld even for persons found guilty of heinous crimes (<http://www.hrc.org.zm/news.php?id=20>)

The commission makes statements on a variety of issues that affect society and is, to a great extent, also involved in law reform, calling on government to enact laws for the betterment of society.¹⁰

Despite all its efforts the commission experiences hurdles in its day-to-day work. One of these problems over the years has been insufficient funding to enable the institution to fulfil its mandate. The financial constraints have

multiplier effects, including understaffing, lack of adequate transport, equipment and other necessary resources. The human and financial constraints have generally undermined the effective functioning of the institution.

Being autonomous, the commission is at liberty to fundraise. However, as is the case with many other organisations, funders believe the government should support institutions like the PHRC for the good of the country's citizens, so funding is not easy to come by and even when it comes it is earmarked for specific projects and may not be used for the general operation of the commission.

THE COMMISSION FOR INVESTIGATIONS

The Commission for Investigations was created in 1974 with a mandate to redress cases of maladministration in the public service. Its area of operation covers complaints by individuals, and the commission, with the consent of the president, may also initiate an investigation into any aspect of maladministration.

The commission is headed by an investigator-general supported by three commissioners. Because its role is not fully understood by the general public the commission often receives complaints which do not fall within its mandate and therefore maintains a working relationship with other democracy protection institutions through case referrals. It strives for 100 per cent case resolution, although it has never achieved this because of a number of challenges, including financial constraints, inadequate human resource, the fact that the office is centralised and has no outreach centres, and the slow pace of review of the legal framework under which it operates. These problems have led to persistently low case resolution.

The CI is able to perform its functions because of the environment, both legal and political, in which it operates. An Act of Parliament details its jurisdiction and role, and there are commissioners to attend to complaints. In terms of the Act the commission may summon representatives of institutions against which complaints have been laid to appear before it to answer the charges. It also has the power to issue warrants of arrest for anyone who refuses to appear before it and has access to confidential

information as and when needed, unless there are issues of public security involved.

In 2008 the commission received a total of 540 cases, of which 380 were resolved and 160 remained outstanding. The failure to resolve all the cases was attributed to inadequate human resource capacity. There is no systematic monitoring and evaluation mechanism in place, although, according to officials of the commission, there was an external evaluation of its activities in 2003. There was no indication, however, of how the information gleaned from the evaluation was used.

At the end of each year the commission produces an annual report. This is directed to the head of state, but members of the public who wish to obtain a copy may request one. The commission conducts small awareness campaigns to inform the nation of its services, but the failure to publicise these services adequately has led a situation where not many people understand its mandate and therefore do not refer cases to it.

Over the years the commission has intensified its efforts to inform the public about its services. All oral submissions are reduced to writing in the English language. During the course of the investigations the complainants are informed from time to time of their progress. Complaints are classified by gender and region because the commission has only one office. In order to improve institutional governance officials at the commission suggest that the institution be turned into a parliamentary, as opposed to an executive, Ombudsman. It is generally felt that reporting to the president may jeopardise the commission's work should the president refuse to consent to investigate particular issues. It is also felt that a parliamentary Ombudsman will have more of a say on the funding of the institution.

The commission is funded through the Ministry of Finance and National Planning which considers the budget prepared by the commission, determines, the allocation, with the approval of Parliament, and transfers funds monthly. In recent years the funds allocated to the commission have increased from 900-million kwacha in 2006 to about 3- billion kwacha in 2009, enabling it to perform its functions more systematically.

Commissioners and other office bearers are civil servants, enjoying the same conditions as all other civil servants. However, as is the case with many other institutions, the budgetary allocations are inadequate to meet the commission's financial requirements. All the funds allocated are spent on meeting its mandate and resource constraints include inadequate funding, inadequate human resource capacity, and lack of equipment such as vehicles, computers, and so on. As a result of these constraints the commission fails to resolve 100 per cent of cases, a failure that has led the public to lose confidence in it.

INTERACTION WITH THE GOVERNMENT

Both the PHRC and the Commission for Investigations have their origins in the Constitution and each is governed by an Act of Parliament that details its operations. Therefore interaction with the three arms of government cannot be divorced from the operations of the two institutions despite the fact that the two institutions are supposed to be independent. While they are, indeed, independent in terms of their daily operations, there is some level of interaction between them and the respective arms of government.

THE PERMANENT HUMAN RIGHTS COMMISSION

As stated above there is no direct relationship with the legislature and the judiciary. The relationship with the executive is through appointment by the president of the chairperson and vice-chairperson. The commission is frequently called upon by Parliament to comment on legislation being considered by the parliamentary select committees that may involve human rights.

The commission endeavours to maintain cordial relations with all government wings and is accountable to Parliament, although its reports are submitted to the president. Once the reports are submitted the chairperson of the commission appears before Parliament to defend the findings contained in the report. The commission remains non-partisan in order that its pronouncements are neutral.

THE COMMISSION FOR INVESTIGATIONS

As alluded to above, the CI relates to the government on certain issues, but not in its daily operations. The investigator-general is appointed by the president and the commission reports to him.

Although the commission does its own annual budget the funding allocation is determined by the Ministry of Finance and National Planning and forms a component of the ministry's annual budget. The money is

given to the commission monthly. Like the PHRC the CI is independent of control by any ministry. This, to a great extent, ensures its independence and enables it investigate anyone below the president.

INTERACTION WITH OTHER DEMOCRACY PROTECTION INSTITUTIONS

Other democracy protection institutions in Zambia include the Judicial Complaints Authority, to which citizens can complain about the actions of members of the legal system such as magistrates and judges. Numerous complaints have been levelled against the judiciary, including meddling in cases that are already in court,¹¹ corruption, and long delays in delivering judgements, with no reasonable excuses given.

Another body is the Police Public Complaints Authority, created in response to the many cases of police brutality in the country and mandated to investigate cases of abuse by police officers. The Anti-Corruption Commission looks at issues of abuse of office and authority, especially on the part of public officers.¹² There is also a Drug Enforcement Commission and an Anti-Money-Laundering Unit. Recently the Auditor General's Chambers have been very active in unearthing financial abuses in many government departments. The relationship between this body and democracy is that if funds are not used as intended those who suffer are citizens who are denied access to the basics of life as a result of the selfishness of a few individuals.

The PHRC and the CI maintain cordial relations with these institutions as partners in democracy and good governance. Cases are referred back and forth, depending on an institution's competence and mandate.

INTERACTION WITH THE PUBLIC AND NON-STATE ACTORS

THE PERMANENT HUMAN RIGHTS COMMISSION

Given that its mandate is to deal with human rights abuses that affect the general public the PHRC collaborates to a significant degree with members of the public and non-state actors. It has offices in all provincial centres, making it accessible to the general public, who, in recent years, have increasingly appreciated this relationship, especially since the commission has incorporated in its work public awareness programmes on both radio and television.

Officials of the commission feel that the number of complaints received indicate that the public appreciates the commission's role and mandate. On the other hand, it is felt that the expectations of the public may be unrealistic and its hopes unachievable because of financial and human resource constraints.

Because the public does not generally understand the operations of the PHRC people tend to have unrealistically high expectations of what it can achieve and are disappointed when their problems cannot be resolved because they do not fall within its ambit.

The PHRC interacts with various non-state actors, including non-governmental organisations (NGOs) that deal with questions of human rights, good governance and democracy. Among these are Transparency International Zambia Chapter, the Southern African Centre for Constructive Dispute Resolution, the Foundation for Democratic Process and the Zambia Civic Education Association.

THE COMMISSION FOR INVESTIGATIONS

The Commission for Investigations has virtually no interaction with the public and non-state actors in terms of collaborating in the execution of its mandate but it considers non-state actors as partners in democracy and

good governance. The commission is not accessible to the general public because it has only one office in Lusaka, hidden in the former Bank of Zambia building, which is difficult to locate, even for Lusaka residents. This contributes to the fact that there is little appreciation among the general public of the commission's role and mandate.

KEY RESEARCH FINDINGS

Officials at both institutions stated that it is clear from the nature of the cases they receive that not many people are acquainted with the legal provisions relating to their work and few understand their specific mandates, which leads to complaints being misdirected. This situation was attributed to their failure to publicise their work.

The institutions strive to attain 100 per cent case resolution for each year. However, their work is hampered in many ways by problems relating to inadequate funding, inadequate human resources, a lack of essential equipment and those hindrances embedded in the enabling legislation. In addition, the CI suffers from the fact that it has only a central office. The net effect of these factors is to undermine the effective execution of the mandates of the two bodies. Cases are delayed, causing further injustices in the long run.

The two institutions are both creatures of the Constitution and were created out of a felt need to curb human rights abuses at various levels. Although they are not dependent on any government ministry for their operations, they are dependent on the government for funding. They are both executive institutions, reporting directly to the president, a problematic aspect, especially in relation to the Commission for Investigations, because it enables the president to halt an investigation. Officials of the commission feel it should be a parliamentary institution reporting directly to Parliament, which would guarantee it true autonomy.

Neither institution has the power to prosecute. After investigating they make recommendations to relevant authorities for further action. However, there was no information available to indicate how long the authorities take to respond to or act on the recommendations. There was also no information available as to what the commissions can do if the authorities fail to act on the recommendations.

There is a clear legal and constitutional framework in place for the two institutions, giving them enough room to operate and ensure the growth of democracy and good governance. However, they work in isolation as there is no close relationship between them or between them and the other democracy protection institutions or non-state actors. The two bodies regard the other DPIs and non-state actors as partners in democracy and therefore refer cases to them from time to time. They both maintain a cordial relationship with the government, but there is no close interaction with any of its three arms.

CONCLUSION

This research set out to investigate the operations of the PHRC and the CI as democracy protection institutions. The research was carried out by means of a questionnaire completed by relevant authorities at the two institutions and was heavily supported by desk research – the analysis of documentation on both institutions.

The information gathered has revealed that the two bodies were created in response to human rights abuses that were rampant at the time of their inception. They were created by the Constitution and are governed by Acts detailing their day-to-day operations. The two bodies are relevant to the fight for human rights and also to the protection of democracy, especially in a young democracy like Zambia. They are also intended to impose checks and balances on the administration of justice.

However, it was established that there are a number of hindrances affecting their operations. The first of these is that they are executive bodies and it is felt that their autonomy, although clearly defined in the legal framework, is not fully realised. Further, a number of derogations within the statutes remove some of their powers. These are known as claw-back provisions and have the effect of watering down the Acts.

Other hindrances include inadequate and irregular funding, inadequate personnel to carry out the work and a lack of transport and other equipment. All these factors have affected the operations of the institutions adversely. The lack of financial independence has contributed to a large extent to their failure to achieve true autonomy.

The two institutions may only make recommendations and have no power to enforce these recommendations or to prosecute, although, in doing their work, they have the power to arrest a person who refuses to appear before them. This latter power is useless if they have no authority to make findings. Therefore, however good their investigations may be,

they cannot determine the actions of the relevant authorities and their recommendations may be ignored with impunity.

Although officials of both institutions believed the appointment of the heads of the two institutions should be left to the president, it was also felt that the bodies should report to Parliament, giving them room to function independently and to make recommendations that are binding on the authorities. They also felt that the recommendations should be accorded the force of High Court decisions so there is an obligation to implement them, although the problem that arises with this is what happens in the face of failure or refusal to obey.

POLICY RECOMMENDATIONS

Although, judging by the legal framework in place, the situation is not alarming, it is important that the findings of the two investigative bodies be taken seriously and positive steps be taken to ensure that they function effectively. The two institutions investigated are both government bodies and, in the face of the findings listed above, it is incumbent upon the government to come up with policies that will ensure such effective functioning.

The following are, therefore, some recommendations that may help the situation.

- In order to have the two bodies implement their mandates fully there is an urgent need for the government to increase their funding. Further, the funding must be released on time and in full, not, as at present, in the form of piecemeal grants. Monthly grants have proved to be ineffective and lead to delays in the implementation of programmes. The Ministry of Finance and National Planning must take into account the funding needs of the two institutions before their budgets are incorporated into that of the ministry and presented to Parliament. Currently the two institutions prepare budgets and submit them to the ministry, which consolidates them and submits one budget to Parliament. When the individual budgets are prepared, they have to be defended by the minister and are often reduced without taking into consideration what is actually needed for the institutions to perform their functions effectively.
- There is a need to strengthen the operations of the two bodies by acting promptly on the recommendations they make. It is therefore felt that there should be a deliberate effort to treat the recommendations as having the force of High Court

judgements and that they should therefore be treated with the urgency they deserve, especially as the issues relate to human rights, which cannot be postponed. The two bodies report to the president, as the appointing authority, after which representatives of the bodies appear before Parliament to defend their findings. Therefore, although they are both executive institutions it is important that Parliament take an interest in the reports and the implementation of the findings so both the president and Parliament are responsible for implementing the recommendations.

- An effort must be made to publicise the work of the two bodies at reduced rates through both the print and electronic media. The bodies are government institutions mandated to help raise awareness and thereby curb human rights abuses throughout the country. They are public institutions intended to be accessed and used by members of the general public. It is therefore imperative that those who need and must use their services are informed about their mandates, their mode of operation and their location. This publicity must be undertaken at two levels: firstly through workshops in communities and secondly through the print and electronic media. To this end the institutions should present a case to the government media for discounts, enabling them to air their programmes. Another suggestion is that the Ministry of Information and Broadcasting, through the office of the Permanent Secretary, should intervene in urgent cases, allowing the institutions to broadcast programmes at discounted rates. This should not, of course, be a permanent arrangement.
- District and provincial offices, especially for the Commission for Investigations, should, as a matter of urgency, be opened, and staff employed. This task must be performed by the government as the owner of the two institutions.
- The work of the two bodies must be complemented by that of other institutions and therefore a deliberate effort should

be made to ensure that there is no conflict of mandates and no unnecessary replication of roles. The government must desist from creating committees and task forces on an ad hoc basis but must, instead, give more financial support to those institutions already in existence.

- The legal framework must be supported fully by removing all claw-back provisions in the enabling legislation, thereby guaranteeing full autonomy in practice. It is recommended, therefore, that the Acts be amended by Parliament from time to time. Further, the law should be amended to provide for the two bodies to have powers to prosecute all matters their investigations reveal to be litigious. In this way, the end result will be a judgement from a court of law capable of being effected in an appropriate manner.

ENDNOTES

- 1 John Mwanakatwe, in his autobiography entitled *Teacher, Politician Lawyer: My Autobiography*, 2003, recounts the case of *R vs Chona* (High Court of Northern Rhodesia 1962), in which Mainza Chona, then national secretary of the United National Independence Party was charged with sedition for publishing 'a document describing the evils of colonial rule'. He states that 'the colonialists did not want the evils of colonialism to be described'.
- 2 See Articles 17-21 of the Constitution of Zambia 1996. Derogations to fundamental freedoms are allowed if they are necessary or reasonably required in the interest of defence, public safety, public order, public morality, public health, and so on. These are wide-ranging derogations with no specific indication of what they actually mean.
- 3 In Zambia this is the case with economic, social and cultural rights, which are non-justiciable because the government lacks the economic resources to provide them. However, the government is creating policies on major issues such as education and health.
- 4 In May 2009, alleging the abuse of office by a particular minister, a citizen petitioned the chief justice to set up a tribunal to investigate the allegations. After 46 days of sittings the tribunal produced and presented its report to the head of state. However, the tribunal made no recommendations, leaving the matter to the discretion of the president as the appointing authority. While allegedly clearing the minister of the allegations, the tribunal did find that the minister had breached the Constitution when she failed to abide by the advice of the attorney general, which she sought and was accordingly given. The minister resigned. Soon after this, she sought a judicial review, maintaining that the tribunal had exceeded its jurisdiction when it found that she had breached the Constitution, as it had not been asked to consider that. The High Court found in her favour and soon after the judgement was handed down the former minister was reappointed to the Cabinet, in a different ministry. While most of the populace feels cheated and blames the judiciary for failing to act, politicians, especially the president, are happy with the turn of events.
- 5 Between 7 and 24 June 2004 the PHRC visited all the prisons and police cells in Lusaka Province to ascertain the conditions in which the inmates were being kept. It was discovered that the standards and conditions in the prisons and cells fell far below the international standards recommended in many human rights instruments (http://hrc.websitedesign.co.zm/media/lusaka_prisons_report.pdf). The commission carried out a similar mission in Central Province in August 2005 and concluded that the conditions were deplorable and an affront to human rights. There was serious overcrowding, with no functional sanitary facilities. The commission recommended that all inmates be given fair and speedy trials to avert the outbreak of disease. They also recommended the abolition of the death penalty because inmates in the death row holding cell were subjected to inhuman treatment, the cell was extremely over crowded, and the unofficial moratorium by the government on executions was aggravating the situation.
- 6 Between 2007 and 2009 the commission embarked on sensitisation programmes

- on both radio and television, aimed at educating the public about its work and ways of accessing its services in the event of human rights abuses.
- 7 On 10 December 2008, during the launch of the celebrations to mark 60 years of the United Nations Declaration of Human Rights, the chairperson of the PHRC, Mrs Pixie Yangailo, challenged the government to domesticate international human rights instruments to ensure that citizens benefit from them. She further hoped that the Constitution, once enacted, would incorporate all the human rights, to make them justiciable. Zambia is currently undergoing a constitutional review process.
 - 8 The *Post* newspaper reported on 13 January 2009 on the visits of the chairperson and vice-chairperson to detention facilities in Northwestern Province. After assessing the conditions and hearing that some detainees had not been brought to court the two recommended that the detainees either be released or be brought to court immediately.
 - 9 The Legal Resources Foundation (LRF) has a prison programme through which inmates are visited for purposes of getting instructions and gathering stories about their stay in prison. The foundation publishes a monthly magazine. In issue 122 of June 2009 it was reported that some accused persons had to wait for more than five years for trial. The article quotes PHRC director Enock Mulembe as saying, 'the law must be upheld, especially in the justice delivery system. The courts must be in the forefront in ensuring that there is no maladministration of justice. Stakeholders should get their act together to ensure justice is not delayed.' He was commenting on the case of six accused persons who had been in detention without trial and are now seeking the intervention of the LRF.
 - 10 On 1 December 2008 the PHRC called for the enactment of laws to end gender-based violence, stating that the systemic violence against women and children is one of the most heinous human rights abuses in the world. The chairperson, Pixie Yangailo, made this call during the commemoration of the 16 Days of Activism Against Gender Based Violence. On 18 February 2009 a police officer was gunned down by armed robbers. The director of the PHRC said on Muvi News that it was high time the police service purchased bullet-proof jackets for all police officers to ensure that they are protected in the line of duty (*Post* 19 February 2009; available online at: <http://www.hrc.org.zm/news.php?id=21>)
 - 11 In June 2009 a lawyer in Lusaka reported the chief justice and the judge in charge (the High Court judge who supervises all High Court judges and is responsible for the everyday smooth operation of the court), based in Lusaka, to the Judicial Complaints Authority for meddling in a case before a particular High Court judge, instructing her to complete the case without delay. The lawyer perceived this to be interference because no judge has ever been instructed in such a fashion. The lawyer believed his client's rights were likely to be abused or that he might be denied the right to a fair trial.
 - 12 There are numerous cases currently in the courts relating to corruption and the plunder of national resources. One of the accused is the former head of state, Dr F T J Chiluba. In June 2009 a scam involving 27-billion kwacha was unearthed at the Ministry of Health. A number of people have been arrested and are appearing in court. This scam led to donor countries, including Norway and Sweden, suspending funding.

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APPENDIX

Questionnaire

A. General	
1.	How long has your institution been in existence? How and why was it established?
2.	Please provide a description of your understanding of your institution's constitutional/legal mandate. Does it include a right of initiative?
3.	What role or function does your institution perform that is not carried out by other institutions, whether in government or civil society?
4.	What other democracy protection institutions exist in your country? How does your institution relate to them?
5.	In what way, if any, does the role and function of your institution overlap with or potentially overlap with that of the other democracy protection institutions?
6.	Does the founding legislation provide a clear, workable and comprehensive legal framework that supports and empowers the institution to successfully fulfil its core mandate?
7.	What outcomes do you strive for in order to realise the constitutional/legal mandate set out in 1 above? How often do you engage in strategic planning?
8.	What have been /are the major constraints facing your institution and how have these impacted on its ability to achieve its mandate?
B. Institutional effectiveness	
9.	What mechanisms are in place to deal with public complaints, to follow through on such complaints and to successfully resolve them?
10.	How many cases/ complaints have been brought to you over the last year?
11.	How many of these were resolved? How many are outstanding and what are the reasons for this?
12.	How do you measure and assess your own effectiveness? What instruments do you use for monitoring and evaluation purposes?
13.	Have you carried out any external evaluation looking at the successes or otherwise of your functions?
14.	Do you produce annual reports? If so, are they publicly available?
15.	What strategies do you employ in carrying out public outreach and ensuring public trust of your institution?

C. Independence
16. How do you view your relationship with the executive and parliament?
17. How do you view your relationship with political parties (both ruling and opposition)?
18. What legal and other mechanisms are in place to ensure and strengthen the institution's independence?
19. Who is your institution accountable to?
20. What is the extent of collaboration and coordination of the work carried out by your institution and similar / related work carried out by other institutions of a similar nature?
21. What safeguards exist to protect your institution from political encroachment?
D. Institutional governance
22. What are the institutional governance arrangements in your institution? Are these arrangements clearly set out and do they allow for a smooth running of the institution? Do you embrace gender issues? What suggestions do you have to improve institutional governance arrangements?
23. Is there a clear, logical and workable division between the members of your institution appointed by President (on advice of the National Assembly) and the Secretariat?
24. Does your institution have mechanisms in place to deal with internal conflict in your institution? If yes, what are these mechanisms and are they effective?
25. What mechanisms are in place for Chief Executive Officers, Chairpersons and Commissioners to disclose and / or seek permission for private / commercial / financial interests or involvement as well as membership in any organisation? Are such mechanisms effective or sufficient to ensure transparency and avoid conflict of interest?
E. Interaction with the public and non-state actors
26. What is the extent of collaboration and coordination of the work carried out by your institution and similar / related work carried out by non-state actors?
27. What was the intended relationship between your institution and the public? To what extent has this relationship been realised?
28. Does your institution have mechanisms in place to deal with complaints by the public about the work done by your institution or the failure to attend to issues?
29. How accessible are the offices of your institution to the public?
30. What kind of complaints do the public bring to you?

31. Do the public have a sufficient appreciation of your role and mandate?
32. Are public expectations of your institution realistic/ unrealistic?
F. Resources
33. Is your institution funded through a designated ministry/ government department or through the consolidated fund voted directly by parliament?
34. Please give an indication of your budget allocation, additional funding and expenditure over the past five years.
35. Please illustrate the budget process followed by your institution, including the process of allocation of funds.
36. Please provide detailed information of the remuneration packages for office-bearers and Commissioners.
37. Are the current budgetary and administrative arrangements sufficient to ensure autonomy of democracy protection institutions?
38. To what extent are the resources allocated to your institution directly spent on meeting its key responsibilities?
39. What are the resource constraints faced by your institution?
40. How does this hamper the work of your institution?

ABOUT EISA



EISA is a not-for-profit and non-partisan non-governmental organisation which was established in 1996. Its core business is to provide technical assistance for capacity building of relevant government departments, electoral management bodies, political parties and civil society organisations operating in the democracy and governance fields throughout the SADC region and beyond. Inspired by the various positive developments towards democratic governance in Africa as a whole and the SADC region in particular since the early 1990s, EISA aims to advance democratic values and practices and to enhance the credibility of electoral processes. The ultimate goal is to assist countries in Africa and the SADC region to nurture and consolidate democratic governance. SADC countries have received enormous technical assistance and advice from EISA in building solid institutional foundations for democracy. This includes: electoral system reforms; election monitoring and observation; constructive conflict management; strengthening of parliament and other democratic institutions; strengthening of political parties; capacity building for civil society organisations; deepening democratic local governance; and enhancing the institutional capacity of the election management bodies. EISA was formerly the secretariat of the Electoral Commissions Forum (ECF) composed of electoral commissions in the SADC region and established in 1998. EISA is currently the secretariat of the SADC Election Support Network (ESN) comprising election-related civil society organisations established in 1997.

VISION

An African continent where democratic governance, human rights and citizen participation are upheld in a peaceful environment

MISSION

EISA strives for excellence in the promotion of credible elections, participatory democracy, human rights culture, and the strengthening of governance institutions for the consolidation of democracy in Africa

VALUES AND PRINCIPLES

Key values and principles of governance that EISA believes in include:

- Regular free and fair elections
- Promoting democratic values
- Respect for fundamental human rights
- Due process of law / rule of law
- Constructive management of conflict
- Political tolerance
- Inclusive multiparty democracy
- Popular participation
- Transparency
- Gender equality
- Accountability
- Promoting electoral norms and standards

OBJECTIVES

- To enhance electoral processes to ensure their inclusiveness and legitimacy
- To promote effective citizen participation in democratic processes to strengthen institutional accountability and responsiveness
- To strengthen governance institutions to ensure effective, accessible and sustainable democratic processes
- To promote principles, values and practices that lead to a culture of democracy and human rights
- To create a culture of excellence that leads to consistently high quality products and services
- To position EISA as a leader that consistently influences policy and practice in the sector

CORE ACTIVITIES

- Research
- Policy Dialogue
- Publications and Documentation
- Capacity Building
- Election Observation
- Technical Assistance
- Balloting

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